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CPLR 205(a): 6-Month Extension Available Where Prior Personal Injury Action Improperly Brought in Name of Deceased Plaintiff Was Voluntarily Discontinued Without Prejudice to Plaintiff's Right to Commence an Action Under CPLR 205(a)

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however, it appears that a sizeable group of products liability plaintiffs will be left without redress.⁴⁰

Peter McNamara

CPLR 205(a): 6-month extension available where prior personal injury action improperly brought in name of deceased plaintiff was voluntarily discontinued without prejudice to plaintiff's right to commence an action under CPLR 205(a)

When a timely commenced action terminates after the expiration of the statute of limitations, CPLR 205(a) provides a 6-month extension from the time of termination to commence a new action.⁴¹

poisoning does not accrue until the disease manifests itself. *Id.* at 160-61. Similarly, in *Brush Beryllium Co. v. Meckley*, 284 F.2d 797 (6th Cir. 1960), a case involving exposure to pollutants, the cause of action was held to accrue at the time the plaintiff became aware of his injury. One court has held that, for the statute of limitations to begin to run, the plaintiff must have knowledge of the relationship between the offense and the damages sustained. See *R.J. Reynolds Tobacco Co. v. Hudson*, 314 F.2d 776 (5th Cir. 1963). The second circuit has held that the plaintiff's awareness of the presence of his injury is a prerequisite to the commencement of the statutory period. See *Ricciuti v. Voltarc Tubes, Inc.*, 277 F.2d 809 (2d Cir. 1960).

At least one state appears to have avoided the time of accrual controversy by statutory enactment. Mo. ANN. STAT. § 516.100 (Vernon 1952).

A lower New York court recently attempted to avoid the harshness of the injury-at-initial-exposure doctrine. In *McKee v. Johns-Manville Corp.*, 94 Misc. 2d 327, 404 N.Y.S.2d 814 (Sup. Ct. Erie County 1978), a case involving injury from exposure to asbestos, the court held that the cause of action in strict products liability began to run on the date the injury was diagnosed. In light of *Thornton*, however, it is unlikely that the *McKee* holding will be sustained on appeal. See Farrell, *Civil Practice — 1978 Survey of New York Law*, 30 SYRACUSE L. REV. 385, 403-04 (1979).

⁴⁰ While the *Thornton* rule presumably allows recovery for reasonably anticipated consequential damages, see *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936); note 15 and accompanying text *supra*, it ignores those cases where injuries are unforeseeable at the time of ingestion. For example, the accrual-on-the-date-of-exposure doctrine would bar the majority of claims for damages caused by radiation exposure, since injury in such cases typically becomes apparent long after the initial exposure. See *Estep & Van Dyke, Radiation Injuries: Statute of Limitations Inadequacies in Tort Cases*, 62 MICH. L. REV. 753, 758-61 (1964).

⁴¹ CPLR 205(a) provides:

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

CPLR 205(a) (Supp. 1979-1980).

Although the extension is available only where a "prior action" was, in fact, instituted,⁴² the courts and commentators disagree on the definition of a "prior action" for purposes of the statute.⁴³ In an

CPLR 205(a) is essentially a reenactment of CPA § 23 and its predecessors with little substantive change. Compare CPLR 205(a) with CPA § 23 (repealed 1963) and CODE OF CIV. PROC. ch. 448 § 405, [1876] N.Y. LAWS 74 (repealed 1920) and CODE OF PROC. (Field Code), ch. 438, § 104, [1849] N.Y. LAWS 637 (repealed 1920). The roots of CPLR 205(a) may, in fact, be traced to the English Limitations Act of 1623, 21 Jac. 1, c.16, § 4 (repealed 1939). See *Gaines v. City of New York*, 215 N.Y. 533, 109 N.E. 594 (1915).

The statutory provision that the extension is not available when the prior action was dismissed for neglect to prosecute has been held to encompass dismissals under CPLR 3216 for want of prosecution, see, e.g., *Williams v. New York Ins. Co.*, 11 Misc. 2d 823, 174 N.Y.S.2d 392 (Sup. Ct. Queens County 1958), dismissals under CPLR 3012(b) for failure to serve a complaint, see, e.g., *Schwartz v. Luks*, 46 App. Div. 2d 634, 359 N.Y.S.2d 899 (1st Dep't), *appeal dismissed*, 33 N.Y.2d 657, 303 N.E.2d 657, 348 N.Y.S.2d 980 (1973), dismissals under CPLR 3404 for abandonment, see, e.g., *Pomerantz v. Cave*, 10 App. Div. 2d 569, 195 N.Y.S.2d 437 (1st Dep't), *appeal dismissed*, 8 N.Y.2d 914, 168 N.E.2d 837, 204 N.Y.S.2d 160 (1960); *Scott v. Rosenwitz*, 213 N.Y.S.2d 196 (Sup. Ct. Kings County 1961), and dismissals for failure to submit to an examination before trial, see, e.g., *Flans v. Federal Ins. Co.*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978).

It should be noted that CPLR 205(a) apparently does not apply where the previous action was commenced outside New York in a state or federal court. See *Baker v. Commercial Travelers Mut. Accident Ass'n*, 3 App. Div. 2d 265, 161 N.Y.S.2d 332 (4th Dep't 1957), *appeal dismissed*, 4 N.Y.2d 828, 150 N.E.2d 233, 173 N.Y.S.2d 803 (1958) (decided under CPA § 23). The extension is available, however, when the prior action was instituted in a federal court in New York. See *Smith v. Rensselaer County*, 52 App. Div. 2d 384, 384 N.Y.S.2d 223 (3d Dep't 1976); *Park & Pollard Co. v. Industrial Fire Ins. Co.*, 197 App. Div. 671, 189 N.Y.S. 866 (1st Dep't 1921) (decided under CODE OF CIV. PROC. § 405 (repealed 1920)).

⁴² CPLR 205(a); note 41 and accompanying text *supra*; see *Smalley v. Hutcheon*, 296 N.Y. 68, 73, 70 N.E.2d 161, 163 (1946); *Erickson v. Macy*, 236 N.Y. 412, 140 N.E. 938 (1923); *Knox v. Beckford*, 258 App. Div. 823, 15 N.Y.S.2d 174 (3d Dep't 1939), *aff'd*, 285 N.Y. 762, 34 N.E.2d 911 (1941).

⁴³ While an action dismissed for lack of subject matter jurisdiction is considered a prior action for purposes of CPLR 205(a), see *Gaines v. City of New York*, 215 N.Y. 533, 109 N.E. 594 (1915); *Smith v. Rensselaer County*, 52 App. Div. 2d 384, 384 N.Y.S.2d 233 (3d Dep't 1976), the courts have indicated that the statute does not apply where the first action was dismissed for lack of personal jurisdiction caused by a defect in service. See, e.g., *Smalley v. Hutcheon*, 296 N.Y. 68, 70 N.E.2d 161 (1946); *Erickson v. Macy*, 236 N.Y. 412, 140 N.E. 938 (1923); *Baker v. Commercial Travelers Mut. Accident Ass'n*, 3 App. Div. 2d 265, 161 N.Y.S.2d 332 (4th Dep't 1957); *Knox v. Beckford*, 258 App. Div. 823, 15 N.Y.S.2d 174 (3d Dep't 1939), *aff'd*, 285 N.Y. 762, 34 N.E.2d 911 (1941). But see *Amato v. Svedi*, 35 App. Div. 2d 672, 315 N.Y.S.2d 63 (2d Dep't 1970). In *Amato*, the plaintiff brought an assault action in the Civil Court of the City of New York for an assault allegedly committed in Suffolk County by a Suffolk County resident. *Id.* at 672, 315 N.Y.S.2d at 64. That action was dismissed for lack of jurisdiction over the nonresident defendant. *Id.* The *Amato* court held that the plaintiff's subsequent action, which had been instituted within 6-months of the termination of the prior action, was entitled to the benefits of CPLR 205(a). The court concluded that the plaintiff's erroneous choice of forum could not preclude the application of CPLR 205(a) since "[a] defect of this nature [must] be distinguished from a failure to achieve service of process upon the defendant . . . in [which] case . . . the action [would be] deemed never to have commenced." *Id.* at 672, 315 N.Y.S.2d at 65 (citation omitted).

Citing the *Amato* case, one commentator maintains that a dismissal for lack of personal

effort to remove this uncertainty, the Court of Appeals, in *George v. Mt. Sinai Hospital*,⁴⁴ recently held that a personal injury action commenced in the name of a decedent is a predicate action for the purposes of CPLR 205(a).⁴⁵

In *George*, a medical malpractice action was commenced in the name of a deceased plaintiff.⁴⁶ After the expiration of the statute of limitations on the malpractice claim, the plaintiff's counsel served an amended summons, substituting the administratrix as plaintiff.⁴⁷ The defendant moved for summary judgment on the grounds, *inter alia*, that service of the amended summons was untimely.⁴⁸ The motion was withdrawn, however, when the parties stipulated to a discontinuance of the action "without prejudice to plaintiff's right to . . . commence any action pursuant to the authority of Section 205 of the CPLR."⁴⁹ Within 6 months of the termination, the administratrix instituted a survival action.⁵⁰ Arguing that an action

jurisdiction over the defendant owing to a "technical flaw" in service would not negate the application of CPLR 205(a), provided the defendant actually receives notice. SIEGEL § 52, at 54. According to Professor Siegel, the "key inquiry" is whether the first action provided "the defendant [with] notice within the applicable period of limitations." *Id.* at 53. See also 1 WK&M ¶ 205.11.

⁴⁴ 47 N.Y.2d 170, 390 N.E.2d 1156, 417 N.Y.S.2d 231 (1979), *rev'g* 62 App. Div. 2d 950, 404 N.Y.S.2d 16 (1st Dep't 1978).

⁴⁵ 47 N.Y.2d at 180, 390 N.E.2d at 1161-62, 417 N.Y.S.2d at 237.

⁴⁶ *Id.* at 173, 390 N.E.2d at 1157, 417 N.Y.S.2d at 233. The decedent died, apparently without the knowledge of her attorney, at some point between the time she had retained the attorney for the purpose of bringing the malpractice action and the commencement of the suit. *Id.* Her death, in any event, was unrelated to the injuries forming the basis for the malpractice claim, and no wrongful death claim was ever commenced. *Id.*

⁴⁷ *Id.* at 174, 390 N.E.2d at 1158, 417 N.Y.S.2d at 233. The plaintiff's attorney discovered his error in time to discontinue the lawsuit and institute a timely survival action. Instead of pursuing that approach, however, he requested the defendant to stipulate to a substitution of the administratrix as plaintiff in the pending action. While awaiting the defendant's response, which was in the negative, the statute of limitations expired on the malpractice claim. *Id.* at 173-74, 390 N.E.2d at 1158, 417 N.Y.S.2d at 233.

⁴⁸ *Id.* at 174, 390 N.E.2d at 1158, 417 N.Y.S.2d at 233. As was noted by the appellate division in *George*, had the plaintiff responded that CPLR 203(e) authorized the relation back of the amended summons to the date of service in the original action, the defendant would have prevailed. 62 App. Div. at 950, 404 N.Y.S.2d at 16-17. See *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 1029-30, 369 N.E.2d 8, 8-9, 398 N.Y.S.2d 1009, 1009-10 (1977); note 62 *infra*.

⁴⁹ 47 N.Y.2d at 174, 390 N.E.2d at 1158, 417 N.Y.S.2d at 234. CPLR 3217, which governs the voluntary discontinuance procedure, permits an action to be discontinued by service of notice, by court order, or by filing with the clerk of the court a stipulation, signed by the attorneys for all parties to the action. See CPLR 3217 (1970). Once the defendant answers the complaint, however, or 20 days after service of the complaint, whichever occurs first, discontinuance is permitted only by court order or stipulation of the parties. See *id.*, commentary at 1005 (McKinney 1970).

⁵⁰ 47 N.Y.2d at 174, 390 N.E.2d at 1158, 417 N.Y.S.2d at 234.

brought in the name of a decedent is a "nullity" and thus not a "prior action" within the meaning of CPLR 205(a), the defendant claimed that the statutory extension was unavailable.⁵¹ The defendant's motion to dismiss the complaint on the ground that it was barred by the statute of limitations was denied by the Supreme Court, New York County.⁵² The Appellate Division, First Department, reversed, finding the first action to have been a nullity.⁵³

On appeal, the Court of Appeals reversed, holding that an action commenced in the name of a deceased plaintiff, although subject to dismissal, is a valid prior action for the purposes of CPLR 205(a).⁵⁴ Judge Gabrielli, writing for a unanimous Court, initially rejected the defendant's "circular" argument that a properly dismissed action is a nullity and cannot provide the basis for the CPLR 205(a) extension.⁵⁵ This interpretation, according to the *George* Court, "would . . . strip [CPLR 205(a)] of a major part of its designated role."⁵⁶ Judge Gabrielli then analyzed the fundamental distinctions between wrongful death and survival actions com-

⁵¹ *Id.* at 174-75, 390 N.E.2d at 1158-59, 417 N.Y.S.2d at 234.

⁵² *George*, 62 App. Div. 2d 950, 950, 404 N.Y.S.2d 16, 16 (1st Dep't 1978).

⁵³ *Id.*

⁵⁴ 47 N.Y.2d at 177-78, 390 N.E.2d at 1160-61, 417 N.Y.S.2d at 235-36. The Court's decision overruled *Eisenthal v. Schatzberg*, 39 Misc. 2d 330, 240 N.Y.S.2d 547 (Sup. Ct. Queens County 1963), *sub silentio*. In *Eisenthal*, CPA § 23, the predecessor to CPLR 205(a), see note 41 *supra*, was held to be unavailable where a prior action on a note, commenced in the name of a decedent, had been dismissed. 39 Misc. 2d at 331, 240 N.Y.S.2d at 549.

The *George* Court also considered whether the stipulation to discontinue the first action precluded the application of CPLR 205(a). 47 N.Y.2d at 180-81, 390 N.E.2d at 1162, 417 N.Y.S.2d at 237-38. See generally note 49 and accompanying text *supra*. Although the statute is expressly inapplicable where the previous action was discontinued voluntarily, CPLR 205(a); see note 41 *supra*, the Court held that the stipulation did not foreclose the 6-month extension. Finding that the parties intended to preserve the plaintiff's rights under the statute, 47 N.Y.2d at 180-81, 390 N.E.2d at 1162, 417 N.Y.S.2d at 238, and that the stipulation contravened no public policy, *id.* at 181, 390 N.E.2d at 1162, 417 N.Y.S.2d at 238 (citing *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 389 N.E.2d 99, 415 N.Y.S.2d 785 (1979), discussed at notes 233-261 and accompanying text *infra*), the Court saw no reason not to effectuate the patent intent of the parties. 47 N.Y.2d at 181, 390 N.E.2d at 1162, 417 N.Y.S.2d at 238.

There is one important caveat to the *George* Court's determination that a party may stipulate to a discontinuance and still avail himself of the saving provision of CPLR 205(a). The Court emphasized that where the stipulation fails to expressly state an intent to preserve one's rights under CPLR 205(a), a claimant subsequently will not be able to take advantage of the 6-month extension because, generally, the motives behind a voluntary discontinuance are irrelevant. *Id.* at 180, 390 N.E.2d at 1162, 417 N.Y.S.2d at 237-38; accord, *Friedman v. Long Island R.R. Co.*, 273 App. Div. 786, 75 N.Y.S.2d 466 (2d Dep't 1947), *aff'd*, 298 N.Y. 702, 82 N.E.2d 791 (1948); *Bannister v. Michigan Mut. Life Ins. Co.*, 111 App. Div. 765, 97 N.Y.S. 843 (4th Dep't 1906), *aff'd*, 194 N.Y. 583, 105 N.E. 1106 (1907).

⁵⁵ 47 N.Y.2d at 176, 390 N.E.2d at 1159, 417 N.Y.S.2d at 234-35.

⁵⁶ *Id.*

menced in the names of those lacking capacity to sue.⁵⁷ Since a wrongful death action is entirely a creature of statute with no common-law counterpart,⁵⁸ the requirements for maintaining the action have been considered substantive elements of the cause of action.⁵⁹ In contrast to the wrongful death action, which has been held not to exist until an administrator has been duly appointed and qualified,⁶⁰ the *George* Court observed that the survival action presupposes a valid claim by the decedent at the time of death and merely removes the common-law bar to a suit on that claim.⁶¹ When brought in the name of the deceased, therefore, it was determined that the survival action should be dismissed but should not be deemed a nullity for CPLR 205(a) purposes.⁶² The Court concluded that CPLR 205(a) was intended to afford the plaintiff a second chance where a properly commenced action has been dismissed for a reason other than a judgment on the merits or a failure to prose-

⁵⁷ *Id.* at 176, 390 N.E.2d at 1159, 417 N.Y.S.2d at 235.

⁵⁸ *Id.*; see *Whitford v. Panama R.R.*, 23 N.Y. 465, 570 (1861); *Boffe v. Consolidated Tel. & Elec. Subway Co.*, 171 App. Div. 392, 394, 157 N.Y.S. 318, 320 (1st Dep't 1916), *aff'd*, 226 N.Y. 654, 123 N.E. 856 (1919); EPTL 5-4.1. The Court stated that "a wrongful death action 'is not a simple devolution of a cause of action which the deceased would have had . . . but . . . is an entirely new cause of action.'" 47 N.Y.2d at 176, 390 N.E.2d at 1159, 417 N.Y.S.2d at 235 (quoting *Whitford v. Panama R.R.*, 23 N.Y. 465, 470 (1861)).

⁵⁹ 47 N.Y.2d at 176-77, 390 N.E.2d at 1160, 417 N.Y.S.2d at 235 (citing *Sharrow v. Inland Lines*, 214 N.Y. 101, 112-13, 108 N.E. 217, 220-21 (1915)).

⁶⁰ *Boffe v. Consolidated Tel. & Elec. Subway Co.*, 171 App. Div. 392, 394, 157 N.Y.S. 318, 320 (1st Dep't 1916), *aff'd*, 226 N.Y. 654, 123 N.E. 856 (1919). It is suggested that the *George* Court seems to have indicated that a wrongful death action instituted in the name of the deceased might not be a prior action within the meaning of CPLR 205(a). See also notes 64-71 and accompanying text *infra*.

⁶¹ 47 N.Y.2d at 177, 390 N.E.2d at 1160, 417 N.Y.S.2d at 235; see EPTL § 11-3.2.

⁶² 47 N.Y.2d at 177-79, 390 N.E.2d at 1160-61, 417 N.Y.S.2d at 236. Judge Gabrielli distinguished the present case from the situation involved in *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 369 N.E.2d 8, 398 N.Y.S.2d 1008 (1977). In *Goldberg*, the plaintiff commenced a wrongful death action in his own name for damages caused by the death of his son. *Id.* at 1029, 369 N.E.2d at 8, 398 N.Y.S.2d at 1008. After the statute of limitations had run on the wrongful death claim, the plaintiff was appointed administrator of his son's own estate. *Id.* He then served an amended summons and complaint substituting himself in his administrative capacity as plaintiff. *Id.* Since the prior action was brought in the name of an improper plaintiff, the *Goldberg* Court held that the amended summons and complaint could not relate back to the original pleadings, see CPLR 203(e), because "there was no pre-existing action to which it could 'relate back.'" 42 N.Y.2d at 1029-30, 369 N.E.2d at 8, 398 N.Y.S.2d at 1009 (citing *Vastola v. Maer*, 39 N.Y.2d 1019, 355 N.E.2d 300, 387 N.Y.S.2d 246 (1976); *Caffaro v. Trayna*, 35 N.Y.2d 245, 319 N.E.2d 174, 360 N.Y.S.2d 847 (1974)).

The *George* Court stated that, in contrast to CPLR 205(a), CPLR 203(e) applies only where there is a valid preexisting action. 47 N.Y.2d at 179-80, 390 N.E.2d at 1161, 417 N.Y.S.2d at 237. "Moreover," stated the Court, "there is a fundamental difference between an action for wrongful death and an action which survives the death of the injured party." *Id.* at 180, 390 N.E.2d at 1161-62, 417 N.Y.S.2d at 237. See generally notes 58-61 and accompanying text *supra*.

cute, and the defendant has been given timely notice of the claim against him.⁶³

While the *George* decision comports with the principles underlying CPLR 205(a), its implication that a wrongful death action, instituted in a non-representative capacity, might not be a prior action under CPLR 205(a) seems questionable.⁶⁴ If a party timely institutes both a survival action and a wrongful death action prior to his appointment as personal representative of the decedent, and the defendant moves to dismiss after the statute of limitations has expired,⁶⁵ the survival action may be salvaged by invoking CPLR 205(a).⁶⁶ The *George* decision, however, indicates that a similar extension, premised on the wrongful death action, should not apply to the wrongful death claim.⁶⁷ Nevertheless, since both claims arise out of the same "transaction or occurrence,"⁶⁸ the wrongful death action apparently could be based on the prior survival action and thereby obtain the benefit of the 6-month extension.⁶⁹ In contrast,

⁶³ 47 N.Y.2d at 178-79, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236-37. In *Gaines v. City of New York*, 215 N.Y. 533, 109 N.E. 594 (1915), Judge Cardozo explained the purpose of a precursor to CPLR 205(a) in the following manner:

The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.

Id. at 539, 109 N.E. at 596.

The *George* Court concluded by observing that CPLR 205(a) generally requires the parties to each action be the same. *Id.* at 179, 390 N.E.2d at 1161, 417 N.Y.S.2d at 237. *Accord*, *Streeter v. Graham & Norton Co.*, 263 N.Y. 39, 188 N.E. 150 (1933); *Breen v. State*, 179 Misc. 42, 37 N.Y.S.2d 371 (Ct. Cl. 1942). Where, however, the plaintiff in the second action is suing as the representative of the claimant in the prior action, and the claim is the same, the Court found no conflict with the statute. 47 N.Y.2d at 179, 390 N.E.2d at 1161, 417 N.Y.S.2d at 237; *cf.* *Van der Stegen v. Neuss, Hesslein & Co.*, 270 N.Y. 55, 200 N.E. 577 (1936) (plaintiff's trustees in bankruptcy added as plaintiffs in second action); *Mehrer v. North Ninth Lumber Co.*, 195 Misc. 566, 90 N.Y.S.2d 285 (Sup. Ct. Kings County), *aff'd*, 275 App. Div. 1059, 92 N.Y.S.2d 178 (2d Dep't 1949) (plaintiff suing in his representative capacity in second action).

⁶⁴ See note 60 *supra*. See generally 47 N.Y.2d at 176-77, 390 N.E.2d at 1159-60, 417 N.Y.S.2d at 235.

⁶⁵ This factual situation is not uncommon. See, e.g., *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 369 N.E.2d 8, 398 N.Y.S.2d 1003 (1977); *Mogavero v. Stony Creek Dev. Corp.*, 53 App. Div. 2d 1021, 385 N.Y.S.2d 899 (4th Dep't 1976).

⁶⁶ 47 N.Y.2d at 180, 390 N.E.2d at 1161-62, 417 N.Y.S.2d at 237.

⁶⁷ But see cases cited in note 69 *infra*.

⁶⁸ See CPLR 205(a), commentary at 55 (McKinney Supp. 1979-1980).

⁶⁹ Indeed, several cases have either held or suggested, without considering whether the prior action was a "nullity," that CPLR 205(a), or a predecessor, could be used to save a wrongful death claim in such circumstances. See, e.g., *Mogavero v. Stony Creek Dev. Corp.*, 53 App. Div. 2d 1021, 385 N.Y.S.2d 899 (4th Dep't 1976); *Mehrer v. North Ninth Lumber Co.*, 275 App. Div. 1059, 92 N.Y.S.2d 178 (2d Dep't 1949); *Boffe v. Consolidated Tel. & Elec.*

if only a wrongful death claim is asserted in the first action,⁷⁰ *George* indicates that CPLR 205(a) may not be invoked to save the claim.⁷¹ It seems anomalous that a plaintiff may save his wrongful death claim by compounding his error in the first complaint.

It is submitted that this unfortunate result stems from confusing a wrongful death claim's substantive elements and its procedural time limitations.⁷² In deciding the CPLR 205 procedural issue, the *George* Court appears to have invoked the same reasoning that was used to dismiss the original action — a decision based on a question of substantive law. A wrongful-death action plaintiff, however, whether proper or improper, should be entitled to the tolls and extensions given by Article 2 of the CPLR.⁷³ Moreover, it is submitted that the *George* Court could have arrived at the same result had its inquiry been limited to whether the plaintiff in the second action had a sufficient identity of interest with the first named plaintiff and whether the previous action gave the defendant notice of the claim.⁷⁴

The *George* opinion further suggests continued adherence to the common-law rule that an action dismissed for defective service of process cannot be a prior action on which to establish the statutory extension.⁷⁵ In dictum, the *George* Court indicated its disapproval of the notion that this rule is premised on the assumption that one of the major purposes of the statute, notice to the defendant, is not satisfied where an action is commenced by improper service.⁷⁶ To

Subway Co., 171 App. Div. 392, 157 N.Y.S. 318 (1st Dep't 1916), *aff'd*, 226 N.Y. 654, 123 N.E. 856 (1919).

⁷⁰ See, e.g., *Mehrer v. North Ninth Lumber Co.*, 275 App. Div. 1059, 92 N.Y.S.2d 178 (2d Dep't 1949); *Boffe v. Consolidated Tel. & Elec. Subway Co.*, 171 App. Div. 392, 157 N.Y.S. 318 (1st Dep't 1916), *aff'd*, 226 N.Y. 654, 123 N.E. 856 (1919).

⁷¹ See generally 47 N.Y.2d at 176-77, 390 N.E.2d at 1159-60, 417 N.Y.S.2d at 235.

⁷² It long has been recognized that the statute of limitations on a wrongful death claim is merely "a procedural limitation on the remedy and not part of the substantive right" to bring the action. *Caffaro v. Trayna*, 35 N.Y.2d 245, 249, 319 N.E.2d 174, 175, 360 N.Y.S.2d 847, 849 (1974); *Sharro v. Inland Lines*, 214 N.Y. 101, 108 N.E. 217 (1915).

⁷³ See, e.g., *Streeter v. Graham & Norton Co.*, 263 N.Y. 39, 188 N.E. 150 (1933); *Mogavero v. Stoney Creek Dev. Corp.*, 53 App. Div. 2d 1021, 385 N.Y.S.2d 899 (4th Dep't 1976); *McDonough v. Cestare*, 3 App. Div. 2d 201, 159 N.Y.S.2d 616 (2d Dep't 1957); *Hoffman v. Delaware & Hudson Co.*, 163 App. Div. 50, 148 N.Y.S. 509 (3d Dep't 1914); CPLR art. 2.

⁷⁴ If the Court's comparison of the survival and wrongful death actions is excised from the opinion, then the applicability of CPLR 205(a) turns only upon a resolution of the party and notice issues. See note 63 and accompanying text *supra*.

⁷⁵ *Smalley v. Hutcheon*, 296 N.Y. 68, 73, 70 N.E.2d 161, 163 (1946) (decided under CPA § 23 (repealed 1963)); *Erickson v. Macy*, 236 N.Y. 412, 416, 140 N.E. 938, 939 (1923) (decided under CODE OF CIV. PROC. § 405 (repealed 1920)); see note 41 *supra*.

⁷⁶ 47 N.Y.2d at 178, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236. The proponents of this theory suggest that if the defendant receives notice and the defect in service is "technical" and goes only to the method, CPLR 205(a) should provide the extension. See SIEGEL § 52, at 54; note 43 *supra*.

the contrary, the Court maintained that actual notice should be irrelevant since the common-law exception to the applicability of the statutory extension is based upon the theory that no prior action was commenced if service was bad.⁷⁷ Yet, in allowing the plaintiff in *George* an extension under CPLR 205(a), the Court seems to have relied upon the fact that the summons, although defective, fully apprised the defendant of the pending suit.⁷⁸ It is suggested that the applicability of CPLR 205(a) should not hinge on the nature of the defect in the prior action, nor on whether the first action was "commenced." Rather, it is submitted that actual notice and vigorous prosecution of the first claim should suffice to invoke the statute.⁷⁹

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ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 308(4): Four attempts to serve the defendant personally during business hours does not constitute due diligence

CPLR 308(4) permits substituted service of a summons upon a natural person where the preferred methods, personal service or delivery "to a person of suitable age and discretion" at the defendant's business or dwelling place and mailing to his last known

⁷⁷ 47 N.Y.2d at 178, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236. The Court noted the "actual notice" rationale was inconsistent with its decision in *Smalley v. Hutcheon*, 296 N.Y. 68, 70 N.E.2d 161 (1946). 47 N.Y.2d at 178, 390 N.E.2d at 1161, 417 N.Y.S.2d at 236. In *Smalley*, the plaintiffs commenced a negligence action in an Illinois state court against the personal representative of the alleged tortfeasor for injuries suffered in an Illinois car accident. 296 N.Y. at 70, 70 N.E.2d at 161. Attempting to effect service pursuant to Illinois' nonresident motorist statute, the plaintiffs served the Secretary of State of Illinois and mailed a copy to the administrator of the deceased defendant. *Id.* at 70-71, 70 N.E.2d at 161-62. That action was dismissed because Illinois' nonresident motorist statute did not authorize service of process on the personal representative of a nonresident motorist in an action against the motorist's estate. *Id.* at 71, 70 N.E.2d at 162. After the Illinois 2-year statute of limitations had expired, the plaintiffs brought suit against the administrator in a New York court. *Id.* From these facts, it appears that the defendant-administrator had actual knowledge of the claim against his intestate. Nevertheless, the Court of Appeals, on the basis of its decision in *Erickson v. Macy*, 236 N.Y. 412, 140 N.E. 938 (1928), held that a similar extension provided by the laws of Illinois did not apply because "no action [had been] commenced" in Illinois. 296 N.Y. at 73, 70 N.E.2d at 163.

⁷⁸ See 47 N.Y.2d at 177-78, 390 N.E.2d at 1160, 417 N.Y.S.2d at 236.

⁷⁹ See *Gaines v. City of New York*, 215 N.Y. 533, 539, 109 N.E. 594, 596 (1915); notes 43, 62 & 76 *supra*.